OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 98-12 February 20, 1998

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Placing Greater Emphasis on Compliance Issues During Initial Stages of Case Processing

Compliance issues may arise anytime during the investigation or litigation of a case. Indeed, by the time a Board Order issues, and appeal rights have been exhausted, that order may be incapable of implementation unless interim, provisional measures have been undertaken to ensure against, among other things, dissipation of assets and fraudulent creation of disguised continuances. Moreover, the practice of waiting until the compliance stage to conduct a compliance investigation - after the case has been litigated and substantial resources have been expended - precludes the Agency from ascertaining at the earliest opportunity that meaningful compliance with any remedial order may not be possible, and that the case should, therefore, not proceed further.

The failure to deal with compliance issues at an earlier stage often results in the unnecessary waste of Agency resources on the prosecution of cases in which no meaningful remedy can be achieved. Furthermore, opportunities to achieve savings in time and resources are lost when the consolidation of compliance proceedings with underlying unfair labor practice proceedings does not take place in those circumstances where such consolidation is appropriate.

In recognition of the above, the Compliance Reinvention Committee developed a recommendation (which was one section of the overall report which was earlier circulated to the field) that Regions engage in the “frontloading” of compliance work. We realize that this approach, while having many benefits, also presents resource allocation and prioritization issues, particularly in light of the Agency’s current budget.

The purpose of this memorandum is to set forth, in a somewhat revised form, the compliance steps which the Compliance Reinvention Committee identified as being part of a proposed frontloading program. The intent is to make this material available to you now as a **resource**, as we give further thought to whether frontloading in one form or another should be implemented in the future. You are encouraged to consider the approaches identified herein (and

it is recognized that some of these things are occurring already) and to adopt them as you see fit. In this regard, it should be emphasized that issuance of complaint does not foreclose Regions from pursuing frontloading activities.

The steps recommended by the Compliance Reinvention Committee include the following:

1. Regardless of the stage of a case, if the prospect of obtaining meaningful compliance with any potential Board Order is highly unlikely, Regions should consider and determine whether further proceedings are warranted. In determining whether to exercise this prosecutorial discretion, the Region should consider those factors identified in Section 10605 of the Casehandling Manual, Compliance Proceedings (Part Three) for closing a case on noncompliance.

2. When it appears that a case may be meritorious, the Region should be alert to any likelihood that the charged entity would avoid or frustrate compliance with a potential Board Order or court judgment. Where this likelihood exists, the Region should evaluate and determine whether early action should be initiated to preserve assets. While this determination must, of necessity, be done on a case-by-case basis, some factors which may be relevant to this determination, either alone or in combination with other factors, include:

A. Transferring or selling assets. A charged party's transfer or sale of assets, especially those necessary to the operation of its business, is cause for concern and may alone establish a need to seek a protective order.

B. History of creating alter egos, successors, etc. A respondent with a history of creating such entities in order to avoid liabilities may do so again.

C. Lack of responsiveness to our proceedings. A charged party's unwillingness to contest or participate in our proceedings may provide insight, in conjunction with other factors, as to its intention of complying with any Board Order or court judgment.

D. Threats to cease operating. Evidence that a respondent has threatened to close may indicate that it will take such action, and at a minimum suggests that it is aware of that method of avoiding compliance.

E. Financial status of respondent. An undercapitalized

respondent or one that is in precarious financial shape bears close watching.

F. How the entity pays its obligations. The failure to make timely fringe benefit payments or other arrearages, and the fact that a charged party pays its employees wages and benefits in cash may suggest that it is not building a long-term relationship with its employees.

G. Structure of respondent's operation. Sole proprietorships and family, or closely-held, corporations are presumably more readily able to cease business and/or move their operations on short notice.

H. Violations of other state, local or federal laws. Such violations could be indicative of the entity's lack of commitment to observe NLRA requirements.

I. Labor-intensive business. An entity that provides primarily inexpensive labor to its customers and has only a small investment in capital, equipment and facilities can more easily cease operations.

J. Length of time respondent has been in existence. An entity that has been operating for only a short duration may not have as great a commitment to continue operating and to comply with adverse judgments as will a respondent who has been operating for many years at one location.

K. Limited function respondent. A respondent created to do a specific job (after which it will cease operating) could be defunct before a Board Order or court judgment is secured.

L. Number and type of employees. An entity whose work force is so unskilled or small in number as to be easily replaced is in a better position to close its operations and immediately reopen with an entirely new work force.

It is expected that in many cases the charging parties will bring the existence of these characteristics to the attention of the Region.[1] In this regard, the Region should encourage the charging parties to share responsibility for identifying and investigating the existence of these characteristics. However, particularly in circumstances where the existence of these characteristics is already indicated, the Region should take the initiative in making reasonable efforts to confirm their existence.

3. The Region should investigate the charged party's prior unfair labor practice history, and the need for stronger or broader administrative remedies, or further enforcement or contempt proceedings. While this point bears repeating, it is in essence a reiteration of current policy [see OM 97-5 (January 8, 1997), entitled "Recidivist Identification: Revised Computerized Appellate Court Case Lookup System"], and a continuation of your current practice.

4. Regions should assess the appropriateness of consolidating compliance issues (i.e., an employee's right to reinstatement) with unfair labor practice issues, and, where appropriate, should seek to resolve remedial issues in the original unfair labor practice proceeding. See Section 10620.3 of the Compliance Manual, and OM 97-16 (March 12, 1997), entitled "Rules Governing the Issuance of Compliance Specifications Prior to a Board Order." Regions are specifically encouraged to consolidate proceedings where one or more the following situations are involved:

A. where the backpay periods are of relatively short duration and have ended before the unfair labor practice hearing begins, e.g., where discriminatees have been reinstated or their backpay periods would have ended due to layoff or cessation of business or bankruptcy;

B. where alter ego/successor liability issues or corporate veil piercing issues have arisen;

C. where backpay or other compliance issues are relatively simple and their consolidation would not confuse, impede, or unduly prolong the hearing; and

D. where the respondent is likely to default and a motion for

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[1] In this regard, Regions may want to send a standard letter to charging parties and discriminatees, once a complaint issues, asking them to be alert for developments which may indicate that the respondent would avoid or frustrate compliance, and to let the Region know of such developments promptly. A sample letter is found in the comprehensive
. compliance training manual which recently issued to the field.

summary judgment will be filed.

5. The Region should gather essential compliance information during the investigative stage, including the following:

A. The discriminatees' social security numbers, addresses, telephone numbers, and driver's license numbers.

B. The discriminatees' job classifications, hours of work, wage rates, and benefits.

C. The respondent employer's federal tax identification number and business information such as corporate owners and officers, related corporate entities, business locations and other information that can be obtained through a Dun & Bradstreet or similar report; the respondent union's officers and other information that can be obtained through an LM-2 or similar report.

6. The Region should ensure that, beginning with the investigative stage, discriminatees (and the charging party) are aware of the discriminatees' obligation to seek interim employment and to preserve interim earnings, expense and job search records.

If you have questions about this memorandum, please contact your Assistant General Counsel, Deputy AGC or the Contempt Litigation and Compliance Branch.

R.A.S.

cc: NLRBU